Supreme Court, U.S.
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92-1924

UNITED STATES SUPREME COURT
OCTOBER 1992 TERM

JAMES CARTER,
MICHAEL BROWNWOOD,
and DREXTEL HOPKINS,

Petitioners,

vs.

HONDA MOTOR COMPANY, LTD.,
AMERICAN HONDA MOTOR CO., INC.,
and HONDA R&D CO., LTD.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether the Circuit Court of Appeals erred in dismissing the Petitioners' appeal on the issue of standing when the Petitioners had standing to appeal under both Article III jurisdictional "case or controversy" principles and the "prudential considerations" established by this Court, and when that appeal presented substantial and compelling questions concerning waiver of work product and attorney client privileges by the disclosure of otherwise protected documents.

PARTIES TO PROCEEDINGS BELOW

The following persons or entities participated in the proceedings in tl United States District Court for the Western District of Arkansas and th United States Court of Appeals for the Eighth Circuit.

1) American Honda Motor Co., Inc. –
Respondent here; Appellee in Circuit Court; Defendant in District Court;

2) Brownwood, Michael – Petitioner here; Appellant in Circuit Cour Nonparty Movant in District Court;

3) Carter, James – Petitioner here; Appellant in Circuit Court; Nonparty Movant in District Court;

4) Honda Motor Co, Ltd. –
Respondent here; Appellee in Circuit Court; Defendant in District Court;

5) Honda R&D Co., Ltd. –
Respondent here; Appellee in Circuit Court; Defendant in District Court;

6) Drextel Hopkins – Petitioner here; Appellant in Circuit Court; Nonparty Movant in District Court;

7) Nelson, Paul A. –
Appellant in Circuit Court; Respondent and Attorney for Nonpar Movants in District Court;

8) Wilburn, Bonita – Plaintiff in District Court;

9) Wilburn, Leo – Plaintiff in District Court.

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Opinions or decisions rendered in this case have not been reported in either official or unofficial reporters.

JURISDICTIONAL STATEMENT

This Court's certiorari jurisdiction is invoked pursuant to Title 28, United States Code, section 1254(1), as this is a Petition on the March 11, 1993, Judgment of the United States Circuit Court of Appeals for the Eighth Circuit dismissing Petitioners' appeal for lack of standing.

STATEMENT OF THE CASE AND BASES FOR FEDERAL JURISDICTION BELOW

I. STATEMENT OF THE CASE

Petitioners here, James Carter, Drextel Hopkins, and Michael Brownwood, are the plaintiffs in three Florida diversity actions against the Respondent Honda entities, *Carter v. Honda Motor Co., Ltd.*, No. 91-574-CIV-T-23A (M.D. Fla., Tampa Div. 1991); *Hopkins v. Honda Motor Co., Ltd.*, No. 92-574-CIV-T-23A (M.D. Fla., Tampa Div. 1992); and *Brownwood v. Honda Motor Co., Ltd.*, No. 92-574-CIV-T-23A (M.D. Fla., Tampa Div. 1992). Petitioners became involved in *Wilburn v. Honda Motor Co. Ltd.*, No. 91-2175 (W.D. Ark., Ft. Smith Div. 1991), the action giving rise to this Petition, when they, through their counsel Mr. Nelson, became sigantories to a Protective Order issued by the *Wilburn* court.

On or about September 23, 1992, counsel for Honda produced a set of never-before-seen documents to plaintiff's counsel in the pending *Wilburn* action. Those documents were immediately distributed to counsel for

Petitioners, Mr. Nelson.[1] On or about September 24 or 25, 1992, after receipt of the documents, Mr. Nelson signed onto a Protective Order earlier entered by the Arkansas District Court on March 20, 1992 (hereinafter the "Initial Order"). The Agreements to be Bound by Protective Order and Consent to Jurisdiction executed by Mr. Nelson were executed on behalf of each of the individual Petitioners, *Carter*, *Brownwood*, and *Hopkins*, and will hereinafter be referred to collectively as the "Agreement."

The Initial Order stated clearly that "[t]he terms of this Order shall remain fully active until released by order of this Court . . . and this Court shall retain jurisdiction over this Order and the foregoing Stipulation for the purposes of enforcing same and adjudicating claims or breached thereof and administering damages and other remedies related thereto." Init. Ord. at ¶ 13. The Agreement executed by Mr. Nelson on behalf of Petitioners stated in part, "I agree to be bound by the terms

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[1] In addition to the two *Wilburn* plaintiffs and the three Petitioners, the documents were also disseminated to plaintiffs and their attorneys in *O'Connor v. American Honda Motor Co., Inc.*, No. 90-0897-CV-W-9 (W.D. Mo., Western Div. 1990); and *Smalley v. Honda Motor Co., Ltd.*, No. 063655 (N.Y. Sup. Ct. 1990).

of the foregoing Protective Order and to be subject to the jurisdiction of the United States District Court for the Western District of Arkansas, Fort Smith Division, for purposes of enforcement of said Protective Order."

Mr. Nelson's October 16, 1992, announcement that he planned to use the *Wilburn* documents in Petitioners' Florida actions, resulted in a flurry of motion activity in both the Arkansas and Florida district courts. In both fora, Honda claimed that the documents were protected by the attorney-client and work product privileges and that disclosure did not operate as a waiver of those privileges.

Arguing this position, Honda counsel in the *Wilburn* action sought and obtained Orders from the Arkansas district court dated October 5 and 16, each prohibiting dissemination of the subject documents. Subsequently, on October 26, 1992, Honda moved for additional relief in the form of specific enforcement of the Court's earlier Orders against Mr. Nelson.

On the afternoon of November 30, 1992, Mr. Nelson received by facsimile transmission an amended and superseding Protective Order dated November 20,

1992 (hereinafter the "Superseding Order"). The Superseding Order, entered as a direct result of the October 26 Honda Motion, required, *inter alia*, that

> 8. All persons who have received copies of any of the subject documents pursuant to the Protective Order on this case shall return to Defendants' counsel, by November 30, 1992, all copies of the subject documents, and all documents containing or describing any excerpts or information therefrom, in their possession, custody, or control.
>
> . . . .
>
> 10. There shall be no further dissemination of any of the subject documents, and no further disclosure, oral or written, of the contents of, or of information in, any of these documents, by Plaintiff, by Plaintiff's attorneys, agents, experts, or representatives, or by any other person who has received a copy of any of the subject documents pursuant to the Protective Order in this case. The contents - including names, dates, headings, and subject matter - shall not be identified by any such person in any writing, including any pleading, motion, discovery request, or other paper filed or served in litigation.
>
> 11. Each person . . . who has received a copy of any of the subject documents pursuant to the Protective Order shall provide to Defendants' counsel, by November 20, 1992, an affidavit certifying that he or she has complied with the Protective Order and stating that he or she has not provided any copy of the

> documents to anyone else. If any such person has not complied with the Protective Order, he or she shall identify each person to whom any copy has been provided.

On December 2, 1992, Mr. Nelson filed with the *Wilburn* court an Emergency Motion for Protective Order, for Rehearing on the Amended and Superseding Protective Order, and for Oral Argument, simultaneously filing similar papers with the district court in Florida. Seven days later, Honda filed a Motion for Adjudication of Contempt against Mr. Nelson in the *Wilburn* court.

The *Wilburn* court required Mr. Nelson to attend a January 7, 1993, hearing on the Emergency Motion for Protective Order, for Rehearing on the Amended and Superseding Protective Order, and on Honda's Motion for Adjudication of Contempt. There, Mr. Nelson presented lengthy argument regarding Honda's waiver of privilege in the subject documents. Ultimately, the court rejected Mr. Nelson's argument and denied his Motion. Honda's Motion for Adjudication of Contempt was also denied.

Petitioners timely appealed the district court's January 15, 1993, ruling on the waiver of privileges to the United States Court of Appeals for the Eighth Circuit,

which appeal was docketed on February 1, 1993. In response, on February 23, 1993, Honda filed an untimely Motion to Dismiss for Lack of Standing to Appeal. Therein, Honda argued that pursuant to Federal Rule of Civil Procedure 3(c) and the "prudential considerations" enunciated by this Court in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982), the appeal should be dismissed for Petitioners' failure to intervene as had occurred in *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam). Honda also requested that "[i]f the Court should conclude that a jurisdictional lack of standing is also presented by this motion . . . the Court find good cause to consider that aspect or that the Court consider that aspect on the Court's own motion, under Rule 47A(b) of the Eighth Circuit."

On March 11, 1993, the appeal was dismissed pursuant to Eighth Circuit Rule 47A. This timely Petition for Writ of Certiorari follows.

II. BASES FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The *Wilburn* action was a products liability action alleging damages in excess of $50,000.00 brought by citizens and residents of the State of Arkansas against Honda Motor Co., Ltd., a Japanese corporation, Honda R&D Co., Ltd., a Japanese Corporation, and American Honda Motor Co., Inc., a California corporation. The diversity jurisdiction of the Arkansas district court was thus properly invoked pursuant to Title 28, United States Code, section 1332.

Petitioners, who each bring their own diversity actions against Honda in a Florida district court, came under the jurisdiction of the Arkansas district court primarily by virtue of their written consent thereto, but also by virtue of the inherent power of any court to enforce the terms of its own orders.

ARGUMENT

I. **The Circuit Court of Appeals erred in dismissing the Petitioners' appeal on the issue of standing when the Petitioners had standing to appeal under both Article III jurisdictional "case or controversy" principles and the "prudential considerations" established by this Court, and when that appeal presented substantial and compelling questions concerning waiver of work product and attorney client privileges by the disclosure of otherwise protected documents.**

A. Preliminary Issues

In the introductory section of its Motion to Dismiss, Honda stated, "t]he lack of standing here is not a jurisdictional 'case or controversy' lack of standing, but . . . lack of standing based on . . . 'prudential considerations,' as a result of Petitioners' failure to intervene in the district court.[2]

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2 Honda's only arguments were based on these prudential considerations; no arguments were made based on a jurisdictional lack of standing.

After conceding this point, however, Honda requested that if the circuit court should conclude *sua sponte* that a jurisdictional lack of standing was also presented, that the court consider that issue on its own motion.

It can be properly inferred that the circuit court dismissed the appeal based on Honda's arguments on the prudential considerations;[3] Petitioners maintain that dismissal was improper under either the prudential considerations or jurisdictional standing, however, and so present arguments here on both bases.

Finally, as previously noted, this appeal was dismissed pursuant to Eighth Circuit Rule 47A.[4] The Rule, entitled "Summary Disposition," states in subsection (b),

> [t]he appellee may file a motion to dismiss a docketed appeal on the ground that the appeal is not within the court's jurisdiction. *Except for good*

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[3] *See infra* note 4.

[4] Eighth Circuit Rule 47A provides for summary disposition on motion of the court in subsection (a) and, as here, on motion of parties in subsection (b). Though the court did not cite to either particular subsection, it is evident that the court dismissed pursuant to subsection (b), since it expressly dismissed based upon Honda's motion.

> *cause* or on the motion of court, a motion to dismiss based on jurisdiction *shall be filed within 15 days* after the court has docketed the appeal.

8TH CIR. R. 47A(b) (emphasis supplied).

This appeal was docketed on February 1, 1993. Honda's Motion to Dismiss was not filed until February 23, 1993 – 22 days after docketing and seven days outside the time allowed by the Rule. Further, Honda made absolutely no showing of good cause[5] for this tardy filing, nor did the court indicate that it had found such good cause. Thus, by the plain terms of the Rule, the court should not have granted the motion.

B. Jurisdictional Standing is Clearly Present

As stated earlier, Honda effectively conceded that Article III case or controversy standing was not implicated in this appeal. In the face of well-settled principles of law it would be difficult to argue otherwise.

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[5] In fact the only mention of the good cause requirement was Honda's request that "the court find good cause" to consider Article III case or controversy jurisdictional standing. Honda made no mention – much less a showing – of good cause in its argument on Petitioner's claimed lack of standing based on the "prudential considerations."

Article III case or controversy standing is conferred when, as here, a litigant alleges an "injury in fact" or a "distinct and palpable injury" causally related to the challenged conduct. *See generally Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970). The doctrine requires that the litigant have a personal stake in the outcome of a matter that is sufficient to assure the concrete adverseness that serves to define issues. *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

In addition to injury in fact, the litigant must demonstrate that the relief sought will prevent or redress his injury. As this Court stated in *Simon* ,

> [w]hen a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Article III limitation.

426 U.S. at 38.

Petitioners are each prosecuting actions against Honda in the United States District Court for the Middle District of Florida.[6] Upon receipt of the subject documents, counsel for Petitioners instantly recognized the critical worth of the documents to prove without question the fraud claims, conspiracy claims, and entitlement to punitive damages that had been pleaded in the Petitioners' cases; these documents were the finishing pieces to a puzzle that had remained long unfinished. What was before only speculation became documented truth, therefore it was crucial that possession of these documents be retained. If compelled by the Arkansas court to return the documents, Petitioner's counsel understood that they would never be seen again.

Honda argued that the subject documents could be sought by Carter, Brownwood, and Hopkins simply by filing appropriate discovery requests in their own actions – albeit with the aid of motions to compel "if Honda

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6 *Carter v. Honda Motor Co., Ltd.*, No. 91-574-CIV-T-23A (M.D. Fla., Tampa Div. 1991); *Hopkins v. Honda Motor Co., Ltd.*, No. 92-574-CIV-T-23A (M.D. Fla., Tampa Div. 1992); and *Brownwood v. Honda Motor Co., Ltd.*, No. 92-574-CIV-T-23A (M.D. Fla., Tampa Div. 1992).

reasserts the attorney-client privilege and attorney-work-product immunity." This argument is specious.

In the context of the *Wilburn* action, the Petitioners assert that the subject documents have lost their privileged nature by virtue of Honda's affirmative disclosure and the relatively wide dissemination that occurred. As a result, the documents were not privileged, and were thus discoverable. In fact, the documents *had already been obtained* by Petitioners and other plaintiffs. In *Carter, Brownwood* and *Hopkins* on the other hand, Petitioners did not possess the documents, the documents retained their privileged character, and the documents are not subject to discovery.[7] That the Petitioners might be able to *request* these documents in their own actions is of absolutely no import. They could request anything; it is only what they are entitled to receive that actually matters.

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[7] Petitioners attempted to discover the documents in their respective actions, but the district court has denied all discovery requests directed to the documents on the basis of privilege.

C. Petitioners are Aggrieved

As the court noted in *United States v. Little Joe Trawlers, Inc.*, 780 F.2d 158 (1st Cir. 1986), the "aggrieved" factor of the standing inquiry requires that the appellant have an immediate interest such that reversal of the trial court's order on appeal would have a direct effect on the appellant. *Id.* at 161. Plainly, because Petitioners were forced by the *Wilburn* court to return critical documents already in their possession that were not obtainable elsewhere, the Petitioners are "aggrieved."[8] Further, a reversal of the trial court's order would confer a direct benefit on the Petitioners, for they would once again be able to obtain and use in their respective actions the subject *Wilburn* documents. Thus, by any definition of the word, the Petitioners are "aggrieved." Any argument to the contrary is simply incorrect.

Because Petitioners once possessed the subject documents – which documents were critical to pleading and proving key elements of their respective cases – but

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[8] In its Motion to Dismiss Honda also argued that the Petitioners "lack standing for the entirely separate reason that they are not 'aggrieved' by the judgment."

were forced to return those documents with no prospect of seeing them again in the future, the have suffered a "distinct and palpable injury" causally related to the challenged conduct that may be redressed by an appellate consideration on the merits. Petitioners thus possess Article III "case or controvery" jurisdictional standing.

D. Petitioners have the Requisite Standing Under the Prudential Considerations Enunciated by this Court

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982), sets forth "the set of prudential principles that bear on the question of standing." *Valley Forge*, 454 U.S. at 474. First, the plaintiff generally must assert his own legal rights and interests, not the rights or interest of another. *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Second, courts will not hear abstract questions of wide public significance which amount only to generalized grievances. *Id.* at 475 (citing *Warth*, 422 U.S. at 499-500). Finally, the courts require that plaintiff's interest fall within the zone to be protected by the legal provision in

question. *Id.* (citing *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Certainly, Petitioners' direct appeal of an adverse ruling involving the enforcement of a protective order against them and the waiver of attorney-client and attorney-work-product privileges satisifies each of the prudential considerations enunciated by this Court.

E. Petitioners have *De Facto* Party Status

A multitude of exceptions exist to the general rule of privity to the record that allow an appeal even if the appellant is not a party of record in the lower court.[9] In fact, a large body of caselaw expressly allows a nonparty appeal where, despite a lack of formal intervention, the nonparty has become a *de facto* party.

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[9] *See, e.g., Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186 (3d Cir. 1990) (appeal by nonparty against whom injunction had been entered);*Commercial Sec. Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352 (10th Cir. 1972) (same); *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542 (9th Cir. 1989) (appeal by nonparty against whom judgment had been entered); *Overby v. United States Fidelity & Guar. Co.*, 224 F.2d 158 (5th Cir. 1955) (appeal by nonparty whose assertion of privilege was denied); *Kloster Speedsteel AD v. Crucible, Inc.*, 793 F.2d 1565 (Fed. Cir.), *cert. denied*, 479 U.S. 1034 (1986) (appeal by nonparty bound as successor or assignee).

For example, in *Securities and Exch. Comm'n v. Wencke*, 783 F.2d 829 (9th Cir.), *cert. denied*, 479 U.S. 818 (1986), the court noted that while formal intervention would have been the better practice, an appeal could still be taken where the appellant was allowed and encouraged to participate fully in the proceedings below. 783 F.2d at 834-35 (citing *In re Proceedings Before Federal Grand Jury (Conforte)*, 643 F.2d 641, 643 (9th Cir. 1981). Specifically, the court found that the equities weighed in favor of allowing the appeal, since the appellant had been haled into the district court by the same party who was contesting appellant's standing to appeal in the circuit court of appeals. *Id.* Further, the court found, the district court had acted toward the appellant as if he were an intervening party allowing and encouraging the appellant to particpate in the proceedings. The court noted that "[a]t least two circuit courts have held that if trial courts treat potential intervenors essentially as parties during proceedings, they should be treated as intervenors at the appellate level as well, even if they have not complied with the formal requirements of Rule 24." *Id.* at 835 n.7

(citing *International Marine Towing, Inc. v. Southern Leasing Partners, Ltd.*, 722 F.2d 126, 128-29 (5th Cir. 1983), *cert. denied*, 469 U.S. 821 (1984); *In re Beef Indust. Antitrust Litigation*, 589 F.2d 786, 789 (5th Cir. 1979); *Roach v. Churchman*, 457 1101, 1104 (8th Cir. 1972)).

Here, Petitoners had been involved in *Wilburn* for over three (3) months, from the day after the subject documents were disclosed by Honda until the January 15, 1993, hearing when the documents were ordered to be returned – the *entire* period of time the subject documents were at issue. Indeed, the appeal by the Petitioners was limited solely to the issues arising during that time period.

As in *Wencke*, Mr. Nelson and the Petitioners were haled into the Arkansas district court by Honda, the same party that now seeks to contest their standing to appeal. As in *Wencke*, the Petitioners were allowed and encouraged by the district court to present argument; in point of fact, Petitioners counsel was actually *ordered* to appear before the Arkansas court to argue the Petitioners' positions. As in *Wencke*, the district court treated

Petitioners as if they had intervened for purposes of contesting the protective orders. Clearly, then, under *Wencke* and the numerous authorities cited therein, the Petitioners have standing to bring this appeal.

In *In re Beef Indust. Antitrust Litigation*, 589 F.2d 786 (5th Cir. 1979), a case cited in *Wencke* and presenting facts strikingly similar to the present action, the nonparty chairmen of two congressional subcommittees were allowed to appeal the denial of their motion for modification of a protective order entered in the underlying antitrust action even though they had failed to intervene. In *Beef Industry* the chairmen sought documents obtained by a party litigant through discovery. *Id.* at 788. The documents were subject to a protective order that prevented disclosure, even to the chairmen exercising congressional subpoena power. *Id.* The chairmen were allowed to file motions with the district court seeking relief from the protective order, which motions were denied. *Id.* Without intervening in the district court action, the chairmen appealed the denial of

their motions. *Id.* None of the parties to the action appealed, yet the chairmen were allowed to appeal. *Id.*

Likewise in *United States v. United Fruit Co.*, 410 F.2d 553 (5th Cir.), *cert. denied*, 396 U.S. 820 (1969), a nonparty motion to examine documents covered by a protective order was denied. *Id.* at 555. Though the nonparty never intervened in the underlying action, its appeal was permitted. *Id.*

In *Johnson v. Trueblood*, 629 F.2d 302 (3d Cir. 1980), plaintiffs' trial counsel was held to have standing to appeal an order revoking his *pro hac vice* status. *Id.* at 303. The court stated "[b]ecause the attorney is a party to the order in the most elementary sense, this case is distinguishable from the situation where the appellant is not directly bound by the order and never intervenes in the district court as a party." *Id.* Like the attorney in *Johnson*, the Petitioners are parties to the *Wilburn* Protective Orders in the "most elementary sense;" not only because they are directly bound by the Orders through counsel's signature, but also because the district

court's rulings divested them of possession of the subject documents.

In *Bank of America v. M/V Executive*, 797 F.2d 772 (9th Cir. 1986), a United States Marshall's commission on arrest and sale of a vessel was substantially reduced by the magistrate pursuant to a stipulation executed by the parties to the underlying action. *Id.* at 773. The marshall filed papers in the action and appeared before the magistrate on oral argument. *Id.* at 774. Though the marshall had failed to intervene in the district court action, his appeal was allowed, because "the equities weigh[ed] in favor of hearing the Marshall's appeal because this [was] the only avenue to obtain appellate review of the issue." *Id.* (citing *Transamerica ICS, Inc. v. M/V Hellenic Sun*, 778 F.2d 194, 195 (4th Cir. 1985)).

Similarly, the equities must weigh in favor of the Petitioners here, because the instant appeal is the only avenue available to them to obtain appellate review of the *Wilburn* court's ruling on the waiver of privilege in these critical documents. No other remedy is available to

the Petitioners than an appeal, for all district courts involved have already spoken.

As noted above, counsel signed onto the *Wilburn* Protective Orders in a representative capacity for the benefit of his clients, the Petitioners here. Thus, the Petitioners expressly assented to the jurisdiction of the Arkansas district court for all matters dealing with or arising out of the Protective Orders or their enforcement. At least with respect to the specific issues to be raised in an appeal, the Petitioners were *de facto* parties to the *Wilburn* action by virtue of counsel's signature to the Protective Orders. For Honda to require that nonparties such as the Petitioners be bound fully by the terms of the district court Protective Orders, and then to contest their ability to appeal the enforcement of those Orders would work a substantial and, indeed, anomolous injustce.

There are many other examples of *de facto* party standing that could be noted here.[10] These cases clearly

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10 *See, e.g., Kenney v. Quigg*, 820 F.2d 665 (4th Cir. 1987) (nonparty who participated in proceedings below and had substantial interest in outcome permitted to appeal despite nonintervention); *Adams v. Morton*, 581 F.2d 1314 (9th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979) (where nonparty appeared in action at behest of trial court, appeal allowed despite

indicate, contrary to Honda's argument, that no *requirement* of intervention exists. In fact, the single case relied upon by Honda to fabricate such a requirment, *Marino v. Ortiz*, 484 U.S. 301 (1988), states only that "[w]e think the better practice is . . . intervention." *Id.* at 304. As Professors Wright and Miller note with respect to the *Marino* case, "the Court's brief statement that intervention is the better practice should not be taken to establish an intervention requirement." 15A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3902.1 n.34 (2d ed. 1992).

Indeed, *Marino* can be distinguished easily from the present action on its facts alone. First, unlike the Petitioners who joined in the *Wilburn* protective order dispute at its inception, the police officers in *Marino* did not even attempt to participate in the action until after a settlement had been reached. *Hispanic Soc. v. New York City Police Dept.*, 806 F.2d 1147, 1152 (2d Cir. 1986), *aff'd sub nom., Marino v. Ortiz*, 484 U.S. 301 (1988). Second,

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nonintervention); *Securities and Exch. Comm'n v. Lincoln Thrift Ass'n*, 577 F.2d 600 (9th Cir. 1978) (creditors with interest in receivership permitted to appeal denial of nonparty motion despite failure to intervene).

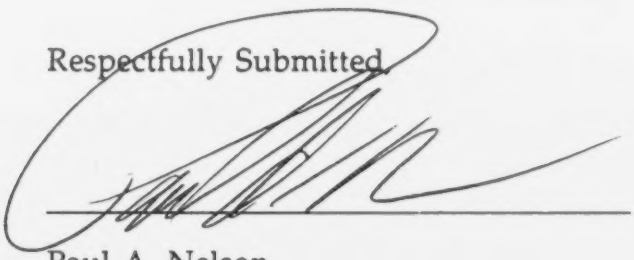
unlike the Petitioners who have a palpable interest in and need for the *Wilburn* documents, the police officers in *Marino* had no interest whatsoever in the settlement, for even if it were reversed they would not have been entitled to any relief. *Id.* Further, the facts presented by the officers on appeal were nowhere set forth in a sworn pleading in the district court action. *Id.* at 1154. In the present action, the issues to be reviewed on appeal were fully briefed and argued in the district court.

F. Conclusion

Petitioners would respectfully submit that dismissal of their appeal by the United States Circuit Court of Appeals for the Eighth Circuit was error. Under any standing analysis – whether Article III jurisdictional inquiry or examination based on the "prudential considerations set forth above – Petitioners plainly had standing to bring this appeal which presents important questions on the waiver of work product and attorney client privileges resulting from the disclosure of otherwise protected documents.

For these reasons, Petitioners respectfully request that this a Writ of Certiorari issue in this action to the United States Circuit Court of Appeals for the Eighth Circuit.

Respectfully Submitted,



Paul A. Nelson
Counsel of Record for Petitioners

APPENDIX A1

JUDGMENT OF UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGTH CIRCUIT DATED MARCH 11, 1993

United States Court of Appeals

FOR THE EIGHT CIRCUIT

No. 93-1268WAFS

Honda Motor Company, Ltd.; American Honda Motor Company, Inc.; Honda R&D Company, Ltd.,	*
Appellees.	*Appeal from *the United *States District *Court for the *Western *District of *Arkansas
vs.	
James Carter; Michael Brownwood, Drextel Hopkins,	*
Appellants.	*

JUDGMENT

Appellees' motion to dismiss the appeal is granted.

The court has reviewed the original file of the United States District Court for the Western District of Arkansas. The appeal is hereby dismissed. See Eight Circuit Rule 47A.

March 11, 1993

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHT CIRCUIT.

MANDATED ISSUED 4/1/93

APPENDIX A2

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS DATED JANUARY 15, 1993

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

BONITA L. ANDERSON WILBURN
PLAINTIFF

V. NO. 91-2175

HONDA MOTOR CO., LTD., ET AL.
DEFENDANTS

ORDER

NOW on this _____ day of January, 1993, comes on to be heard the Motion for Protective Order, Motion for Rehearing, and Motion for Oral Argument and Combined Memorandum of Law filed by Mr. Paul Nelson on behalf of non-parties; Motion for Adjudication of contempt Against Mr. Paul A. Nelson; and Motion for Protective Order and for Enforcement of Order Entered on November 20, 1992. The Court, being well and sufficiently advised, finds and orders as follows:

1. After hearing the parties on the above motions on January 7, 1993, the Court ruled from the bench as follows:

a) Mr. Nelson's Motion for Protective Order, Motion for Rehearing, and Motion for Oral Argument and Combined Memorandum of Law is denied;

b) defendant's Motion for Adjudication of Contempt against Mr. Paul A. Nelson is denied;

c) As a result of the foregoing rulings, the defendant's Motion for Protective Order and for Enforcement of Order Entered on November 20, 1992 is rendered moot.

2. Now, in order to amplify said rulings, the Court further finds and orders:

a) This Court ruled by Order dated October 5, 1992 that the disclosure by defendant of the documents in question was inadvertent and, under relevant law, defendant had not waived any privilege that may have attached to the documents. The Court continues to believe this ruling was correct and there has been no appeal therefrom. It is the Court's opinion that since Mr. Nelson signed the protective order on March 20, 1992, he proceeded to

use any documents received through this Court at his peril as long as this case was ongoing. Further, when plaintiff's counsel and Mr. Nelson first obtained the documents in question, which were then clearly stamped with indications that they were considered and claimed to be privileged documents, they were on notice, at least prior to the beginning of the trial in this case which began on September 29, 1992, that the Court might and probably would thereafter enter a ruling on the waiver of the privilege. This did, in fact, occur.

b) by Order dated November 20, 1992, the Court ruled that the documents in question are confidential, proprietary, and competitively sensitive data within the meaning of the Protective Order entered on March 20, 1992, and that they were also protected by the attorney-client privilege and attorney work-product immunity.

c) The Court is of the opinion that when Mr. Nelson received the November 20, 1992 Order, he proceeded as promptly as he could under the

circumstances to seek a ruling from this Court on his handling of the documents in question. Accordingly, the Court cannot say that Mr. Nelson's behavior to this point has been contemptuous.

d) The Court is of the opinion that the November 20, 1992 Order is clear and that it requires all documents inadvertently produced and disseminated to be returned to defendant.

e) Mr. Nelson returned the documents in question to defendants in the presence of the Court, and it was agreed upon among the attorneys present at the hearing that, upon the happening of that event, all copies of said documents had then been returned to defendants.

f) Mr. Nelson, as an officer of the Court, specifically assured the Court and the defendant that he will not attempt to use either the documents or any copies of those specific documents which were produced during the course of the Wilburn trial in any other matter, nor will he discuss their contents. These assurances were not intended to state or imply

that Mr. Nelson would not seek other copies of the original documents in question which he might properly obtain from sources other than this case now before the Court.

g) The Court further notes, without ruling on the legal ramifications involved, that nothing in the November 20, 1992 Order prohibits Mr. Nelson from attempting to obtain, through legitimate discovery means, the documents in question from any other court. His is prohibited, however, from discussing the contents thereof until such time as another court may order otherwise.

3. The Court hereby finds that by virtue of the Order entered on November 20, 1992 as well as this Order, all post-trial motions have been disposed of, and there being nothing further required of this Court, this case is hereby closed.

IT IS SO ORDERED.

JIMM LARRY HENDREN
UNITED STATES DISTRICT JUDGE

APPENDIX A3

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS DATED NOVEMBER 20, 1992

IN THE UNITED STATES DISTRICT COURT FOR

THE
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

BONITA L. (ANDERSON) WILBURNVan Buren, Arkansas,	)	
Plaintiff	)	
	)	Case No. 91-2175
vs.	)	
HONDA MOTOR COMPANY, LTD. et al.,	)	
Defendants.	)	

ORDER

NOW on this _____ day of November, 1992, comes to be heard Defendant's Motion for Reconsideration and for Enforcement of Protective Order and Plaintiff's Motion for Reconsideration of Court Orders Concerning Production of Documents by Defendant on September 23, 1992 ("the motions"). The Court has considered the motions, examined in camera the documents that are the subject of the

motions, and heard the positions of the parties. Defendants agree with the Court's findings and conclusions and with the entry of this Order. While Plaintiff will not state on the record that she either agrees with the Court's findings and conclusions or with the entry of this Order, neither does Plaintiff indicate disagreement with either. Thus, the Court concludes that Plaintiff neither admits nor denies the accuracy or appropriateness of the Order and its contents. Based upon the Court's perceptions of the respective positions of the parties on this Order and its contents, the Court determines that the Order constitutes a fair, reasonable and appropriate disposition of the motions. Accordingly, the Court hereby ORDERS that the order entered in this case on October 16, 1992, be amended and replaced in its entirety by the following:

1. The seventeen documents that are the subject of the motions are confidential, proprietary, and competitively sensitive data within the meaning of the Protective Order entered on March 20, 1992, by

Judge Morris Arnold, and of the Stipulation for Entry of Protective Order incorporated therein by reference. In addition, the protective legends stamped on the documents to ensure their confidentiality and protection are the substantial and sufficient equivalent of the language specified in paragraph 3 of the Protective Order, especially because they fully satisfy the marking requirement specified in paragraph 4 (1) of the Stipulation that is incorporated by reference in the Protective Order. The documents therefore are, and were when produced in this action to Plaintiff's counsel on or about September 22, 1992, fully protected by the Protective Order.

2. The subject documents also are protected by the attorney-client privilege and the attorney work-product immunity. Defendants have at all times maintained that privilege and immunity. The disclosure of the documents to Plaintiff's counsel in this case was inadvertent, unauthorized by the privilege holder, immediately corrected by

Defendants to the maximum extent possible, and not a waiver.

3. On or before November 30, 1992, Plaintiff's counsel shall provide Defendants with a list of the names and addresses of the people to whom the subject documents were disseminated by Plaintiff, Plaintiff's counsel or other representatives, or persons who received copies from any of them, other than Plaintiff's consulting experts.

4. Plaintiff's counsel also shall provide Defendants with copies of the Protective Orders executed by all persons who received copies of the protected documents, including Plaintiff's trial experts. With respect to Plaintiff's consulting experts, Plaintiff's counsel shall obtain from each consulting expert an affidavit stating that each of Plaintiff's consulting experts has complied with the terms of the Protective Order. Plaintiff's counsel shall hold said affidavits of consulting experts in the offices of Plaintiff's counsel. Plaintiff's counsel shall provide Defendants with an affidavit stating that Plaintiff's

consulting experts have complied with the terms of the Protective Order. If any consulting expert has failed to comply with the terms of the Protective Order, his or her identity shall be disclosed to Defendants and he or she is to be considered a testifying expert for the purposes of this Order. The list, copies of the executed Protective Orders, and the affidavit shall be provided to Defendant's counsel on or before November 30, 1992.

5. The Court has returned to Defendants the copies of the documents that the Court previously had required Plaintiff's counsel to deliver to the Court.

6. Plaintiff's counsel shall return to Defendant's counsel, on or before November 30, 1992, all copies of the subject documents, and all excerpts copied therefrom, in the possession, custody, or control of Plaintiff, her counsel, or any of her agents, experts, or representatives.

7. Plaintiff's counsel immediately shall telecopy, to each person named on the list provided pursuant to paragraph 2 above, a copy of this Order.

8. All persons who have received copies of any of the subject documents pursuant to the Protective Order in this case shall return to Defendants' counsel, by November 30, 1992, all copies of the subject documents, and all documents containing or describing any excerpts or information therefrom, in their possession, custody or control.

9. Plaintiff's counsel has represented to this Court that all persons to whom they provided copies of the subject documents agreed to be bound by the Protective Order. Plaintiff's counsel shall use their best efforts to ascertain whether any additional copies, or excerpts of copies, of any of the document have been provided to any other person and, if so, to retrieve and return to Defendants all additional such copies and excerpts.

10. There shall be no further dissemination of any of the subject documents, and no further

disclosure, oral or written, of the contents of, or of information in, any of these documents, by Plaintiff, by Plaintiff's attorneys, agents, experts, or representatives, or by any other person who has received a copy of any of the subject documents pursuant to the Protective Order in this case. The contents -- including names, dates, headings, and subject matter -- shall not be identified by any such person in any writing, including any pleading, motion, discovery request, or other paper filed or served in litigation.

11. Each person (other than Plaintiff's consulting experts), who has received a copy of any of the subject documents pursuant to the Protective Order shall provide to Defendants' counsel, by November 30, 1992, an affidavit certifying that he or she has complied with the Protective Order and stating that he or she has not provided any copy of the documents to anyone else. If any such person has not complied with the Protective Order, he or she

shall identify each person to whom any copy has been provided.

12. The Plaintiffs' Supplemental Suggestions in Support of Plaintiffs' Motion for Court - Imposed Sanctions on Defendant, American Honda Motor Co., Inc., and Defendant, Honda Motor Co., Ltd., Plaintiff's Motion for Reconsideration of Court orders Concerning Production of Documents by Defendants on September 23, 1992, and Memorandum Brief in Support Thereof, Plaintiff's Amended Exhibit List, Plaintiff's Memorandum Brief in Opposition to Defendants' Oral Motion Requesting Return of Documents Produced on September 23, 1992, Plaintiff's Response to Defendants' Motion in Limine, Plaintiff's Motion for New Trial, Plaintiff's Memorandum of Law in Support of Motion for New Trial, and Court Transcripts from the two hearings held on October 7, and 13, 1992, at Defendants' request regarding the protected documents, all of which were filed or heard in this case, and all of which include a copy of the

subject documents as an exhibit, or discuss the documents in some way, together with all other documents that discuss or disclose any of the documents, shall be placed under seal so that the exhibits cannot be disclosed outside the scope of the Protective Order in this case.

13. Plaintiff's Motion for Reconsideration of Court Orders Concerning Production of Documents by Defendant on September 23, 1992 and Memorandum Brief in Support Thereof is denied.

IT IS SO ORDERED this _____ day of November, 1992.

_____

United States District Judge

Supreme Court, U.S.
FILED
JUN 21 1993
OFFICE OF THE CLERK

No. 92-1924

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JAMES CARTER, MICHAEL BROWNWOOD, and DREXTEL HOPKINS,
Petitioners,
v.
HONDA MOTOR COMPANY, LTD., AMERICAN HONDA MOTOR CO., INC., and HONDA R&D CO., LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether this Court should review a decision of the United States Court of Appeals for the Eighth Circuit dismissing the appeal of appellants who were not parties to the underlying action, who did not intervene or move to intervene in the underlying action, who therefore lacked jurisdictional standing to appeal the judgment of the district court under *Marino v. Ortiz*, 484 U.S. 301 (1988) (per curiam), and who also lacked standing to appeal based on prudential considerations articulated by this Court in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982).

PARTIES TO THE PROCEEDINGS

The following persons or entities participated in the proceedings in the United States District Court for the Western District of Arkansas and in the United States Court of Appeals for the Eighth Circuit:

1) Bonita Wilburn and Leo Wilburn,
   Plaintiffs in the District Court

2) American Honda Motor Co., Inc., Honda Motor Co., Ltd., and Honda R&D Co., Ltd.,

   Defendants in the District Court
   Appellees in the Court of Appeals
   Respondents in the Supreme Court

3) Michael Brownwood, James Carter, and Drextel Hopkins

   Nonparty Movants in the District Court
   Appellants in the Court of Appeals
   Petitioners in the Supreme Court

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1924

JAMES CARTER, MICHAEL BROWNWOOD, and DREXTEL HOPKINS,

Petitioners,

v.

HONDA MOTOR COMPANY, LTD., AMERICAN HONDA MOTOR CO., INC., and HONDA R&D CO., LTD.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Honda Motor Co., Ltd., American Honda Motor Co., Inc., and Honda R&D Co., Ltd. (collectively, "Honda") respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Eighth Circuit entered on March 11, 1993, dismissing Petitioners' appeal.

STATEMENT OF THE CASE

This is a product liability action commenced on August 26, 1991, by Plaintiff Bonita L. Wilburn against Honda. It was tried to a jury, which returned a defense verdict on all counts on October 14, 1992. On October 19, 1992,

the district court entered judgment for Honda. Petitioners Carter, Brownwood, and Hopkins ("Nonparty Appellants") were at no time parties or intervenors in the district court, and the district court at no time entered any judgment or order addressed to them.

The matter that caused Nonparty Appellants to attempt to appeal arose out of pretrial discovery proceedings. On March 20, 1992, during the course of pretrial proceedings, the district court entered a protective order regarding the confidentiality of documents to be produced in discovery ("the March 20 Protective Order"). The order provided, *inter alia*, that confidential documents produced by Honda during discovery could be shown to other lawyers, but only after Plaintiff Wilburn's lawyer had first obtained from each such lawyer a written agreement to be bound by the March 20 Protective Order and to submit to the jurisdiction of the district court in this case for enforcement of that order. (Appendix B, p. 5a.)

On September 23, 1992, one of Honda's outside counsel in this case inadvertently produced several of Honda's attorney-client-privileged and work-product documents to Plaintiff Wilburn's counsel. Wilburn's counsel thereafter provided copies of the documents to Paul A. Nelson, a Florida lawyer who had filed lawsuits against Honda in Florida on behalf of Nonparty Appellants. Mr. Nelson personally executed a written agreement to be bound by the March 20 Protective Order and to be subject to the jurisdiction of the district court in this action for enforcement of that order. Specifically, Mr. Nelson stated:

> I agree to be bound by the terms of the foregoing Protective Order and to be subject to the jurisdiction of the United States District Court for the Western District of Arkansas, Fort Smith Division, for the purposes of enforcement of said Protective Order . . . .

(Appendix B, p. 9a.) At no time did Nonparty Appellants execute any similar agreement, and at no time did

Mr. Nelson execute any similar agreement stating that it was on their behalf.

On September 29, 1992, Honda moved for an order prohibiting further dissemination of its privileged and work-product documents. On October 5, 1992, the district court entered an order holding that the production of Honda's documents had been inadvertent and that no privilege had been waived by the production. On October 16, 1992, the district court entered an additional order prohibiting further dissemination of Honda's documents.

On October 26, 1992, Honda filed a motion for reconsideration of a portion of the October 16 order and a motion to enforce the March 20 Protective Order. In particular, Honda asked the district court to order Mr. Nelson to return his copies of Honda's privileged and work-product documents.

On November 20, 1992, the district court ruled on Honda's motion to enforce the March 20 Protective Order. The court (a) held that the documents in question were properly protected under the March 20 Protective Order and were further protected by the attorney-client privilege and work-product immunity, (b) reiterated that the privilege had not been waived, and (c) ordered that all persons who had obtained copies of the documents and were bound by the March 20 Protective Order were to return the documents to Honda.[1] (*See* Pet. App. A3.)

On December 2, 1992, Mr. Nelson filed in the district court a document entitled "Motion for Protective Order, Motion for Rehearing, and Motion for Oral Argument and Combined Memorandum of Law." Although the

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[1] Although Nonparty Petitioners characterize the November 20, 1992 order of the district court as a "superseding Protective Order," the order in fact was the district court's response to Respondents' request that the March 20 Protective Order be enforced. Thus, it was an order enforcing, not "superseding," the March 20 Protective Order.

caption read "Bonita L. (Anderson) Wilburn, Van Buren, Arkansas, Plaintiff vs. Honda Motor Company, Ltd., et al., Defendants," Mr. Nelson signed the document as "Attorney for Plaintiffs" and began the document by stating, "Come Now Plaintiffs, James Carter, Michael Brownwood, and Drextel Hopkins, by and through their undersigned attorney, and file this Motion . . . ." In fact, neither then nor at any other time were James Carter, Michael Brownwood, and Drextel Hopkins plaintiffs in the district court action. Nor did any of them at any time intervene, or even move to intervene, in the district court action. Nor had Plaintiff Wilburn's counsel provided Honda's documents to them. Nor does the record indicate that anyone else had provided Honda's documents to them. Nor had the district court entered any order addressed to them. Nor had they filed any previous motion, participated in discovery, been served with any subpoena, or otherwise participated in any other way in this case.

On December 9, 1992, Honda filed a Motion for Adjudication of Contempt against Mr. Nelson, alleging violations of the several orders of the district court described above. On the same day, Honda filed a memorandum in opposition to the motion that Mr. Nelson had purported to file on behalf of "Plaintiffs" Carter, Brownwood, and Hopkins. In its memorandum, Honda pointed out that those individuals lacked standing to make the motion filed by Mr. Nelson. It was Mr. Nelson, not Nonparty Appellants Carter, Brownwood, and Hopkins who had received Honda's documents, who had submitted to the district court's jurisdiction, and who was addressed by the district court's orders.

On January 7, 1993, the district court heard Honda's motion for contempt against Mr. Nelson and the motion filed by Mr. Nelson. Mr. Nelson appeared and argued.

On January 15, 1993, the district court entered an order denying "*Mr. Nelson's* Motion for Protective Order, Motion for Rehearing, and Motion for Oral Argument"

(emphasis added) and denying Honda's contempt motion. The court noted that Honda's motion to require Mr. Nelson to return its privileged and work-product documents was moot because Mr. Nelson had returned Honda's privileged and work-product documents in the court's presence and all copies thereby had been returned to Honda. The court further noted that "nothing in the November 20, 1992, Order prohibits Mr. Nelson from attempting to obtain, through legitimate discovery means, the documents in question from any other court." (Pet. App. A2.) Neither on January 15 nor at any other time did the district court require Nonparty Appellants Carter, Brownwood, and Hopkins to do anything or prohibit them from doing anything.[2]

Nonparty Appellants filed their notice of appeal in the court of appeals on January 19, 1993. Neither the plaintiffs in this action nor Mr. Nelson appealed.[3] The court of appeals entered a judgment of dismissal of the appeal on March 11, 1993, and the mandate issued on April 1, 1993.

---

[2] Mr. Nelson has, on behalf of Nonparty Appellants Carter (Civil Action No. 91-574-CIV-T-23A) and Hopkins (Civil Action No. 92-574-CIV-T-23A), moved in the United States District Court for the Middle District of Florida, Tampa Division, to compel production of Honda's privileged and work-product documents. That court is the venue for Nonparty Appellants' separate civil actions against Honda. In both cases, that court reviewed the subject documents *in camera* and determined, as had the district court in Arkansas, that Nonparty Appellants' claims were without merit and that the documents were privileged and work-product documents, protected from discovery in civil litigation. No appeal from those separate orders has been taken by Nonparty Appellants Carter and Hopkins.

[3] Although Petitioners' listing of parties to proceedings below (Pet. p. ii) identifies Paul A. Nelson as an appellant in the court of appeals, Mr. Nelson in fact is only counsel of record for Nonparty Appellants in the court of appeals. He did not appeal the district court's ruling in his own name.

REASONS FOR DENIAL OF THE PETITION

I. THE ISSUES PRESENTED IN NONPARTY APPELLANTS' PETITION ARE NOT OF A CHARACTER THAT WARRANTS DISCRETIONARY REVIEW BY THIS COURT.

The petition presents no basis for discretionary review by this Court. The decision of the court of appeals does not conflict with the holding of any other circuit or of any state court of last resort. The court of appeals "has not so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Supreme Court Rule 10.1(a). The court of appeals has not decided an important question of federal law that has not yet been settled by this Court. And the court of appeals has not decided a federal question in a manner that conflicts with other applicable decisions of this Court. Rather, the court of appeals' dismissal, under the procedural facts of this case, is mandated by rulings of this Court in *Marino v. Ortiz*, 484 U.S. 301 (1988) (per curiam), and *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982).

The petition also does not ask this Court to review any rule of law. Instead, it asks this Court to review *factual* findings made by the district court regarding privileged and work-product documents and *factual* findings that underlay the court of appeals' dismissal of the appeal for lack of standing—namely, findings regarding appearances, intervention, and timeliness.

The petition therefore should be denied because it does not present issues that warrant this Court's attention.

II. THE COURT OF APPEALS PROPERLY DISMISSED THE APPEAL BECAUSE NONPARTY APPELLANTS WERE NOT PARTIES, DID NOT INTERVENE, WERE NOT THE SUBJECTS OF ANY ORDER, AND LACKED STANDING TO APPEAL THE DISTRICT COURT'S JUDGMENT.

In *Marino v. Ortiz*, 484 U.S. 301 (1988) (per curiam), this Court reconfirmed that "[t]he rule that only parties to a lawsuit, or those that properly became parties, may appeal an adverse judgment, is well-settled." 484 U.S. at 304. After noting that the court of appeals in that case had suggested that there might be some exceptions to the general rule, this Court disagreed, stating: "We think the better practice is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course, appealable." 484 U.S. at 304. Under the requirements thus stated in *Marino*, Nonparty Appellants in this case lacked standing, and their appeal was properly dismissed.

The facts in *Marino* are analytically identical to the facts here. There, certain groups representing ethnic minority police officers of the New York City Police Department brought a civil rights action against the Department, challenging the Department's promotion practices. Three other groups, primarily representing white police officers, intervened.

The parties reached a settlement, and the district court held a hearing to determine whether to approve it. Several individual white police officers filed objections to the proposed settlement, and their lawyer was allowed to argue at the hearing that the proposed settlement would violate their right to equal protection. *See Hispanic Society v. New York City Police Dept.*, 806 F.2d 1147, 1152 (2d Cir. 1986), *aff'd sub nom. Marino v. Ortiz*, 484 U.S. 301 (1988). Those individual officers never moved to intervene, however.

The district court approved the settlement, specifically rejecting the argument made by the nonparty individuals'

counsel. 806 F.2d at 1152. The nonparty individuals appealed, and the court of appeals dismissed their appeal, stating: "Because appellants never moved to intervene in these proceedings, they are not parties to this litigation, and their appeal must be dismissed." 806 F.2d at 1152. The nonparty individuals argued that their filing of written objections and their appearance at the hearing gave them status as parties, but the court of appeals disagreed, stating: "The fact that appellants were permitted to object to the settlement in the district court does not make them parties, or enable them to appeal from the approval of the settlement." 806 F.2d at 1153. This Court affirmed.

Here, likewise, a lawyer for Nonparty Appellants filed written objections to the district court's proposed order and made oral arguments to the district court regarding the nonparties' interests. Here, too, Nonparty Appellants were not parties and never intervened, or even filed a motion to intervene, pursuant to Federal Rule of Civil Procedure 24. Indeed, Honda's Memorandum of Points and Authorities in Support of Response to Non-Parties' Motion for Protective Order, Motion for Rehearing, and Motion for Oral Argument and Combined Memorandum of Law expressly argued that the nonparties lacked standing, yet the nonparties chose not to cure that defect by moving to intervene. As in *Marino*, therefore, "Appellants' predicament results from their steadfast refusal to comply with the requirements set forth in Fed. R. Civ. P. 24." *Hispanic Society*, 806 F.2d at 1153-54. Exactly as in *Marino*, therefore, the nonparties lack standing to appeal the judgment below, and their appeal was dismissed by the court of appeals. This dismissal is fully consistent with this Court's mandate in *Marino*.

In fact, the basis for dismissal here is even stronger than it was in *Marino*. There, the employment interests of the nonparty appellants were directly and adversely affected by the district court's ruling, and those individuals were precluded from attacking the settlement consent decree in a separate lawsuit. *See Marino*, 484 U.S. at

303. Here, in stark contrast, Nonparty Appellants can seek to obtain the Honda documents they claim to want simply by serving appropriate discovery requests in their own lawsuits in Florida and by moving to compel production if Honda reasserts the attorney-client privilege and attorney-work-product immunity. The district court's order expressly indicates that they may do so. If their motions in their own cases are denied, they may appeal those denials in the appropriate manner and in the appropriate courts.[4]

Therefore, Nonparty Appellants lack standing for the entirely separate reason that they are not "aggrieved" by the judgment from which they seek to appeal. *See, e.g., United States v. Little Joe Trawlers, Inc.*, 780 F.2d 158, 161 (1st Cir. 1986); *Estate of Bishop v. Bechtel Power Corp.*, 905 F.2d 1272, 1276 (9th Cir. 1990).

> [A]t an irreducible minimum, Article III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," (citations omitted). . . .

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). Neither the judgment from which Nonparty Appellants purport to appeal nor any order entered by the district court directs them to do anything or prohibits them from doing anything. Since Nonparty Appellants have not been aggrieved as a result of the district court's orders, they do not have standing to pursue an appeal in this action.

Nonparty Appellants argue that they are aggrieved "because Petitioners were forced by the *Wilburn* court to

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[4] As stated in note 2 above, Nonparty Appellants Carter and Hopkins moved for production of these documents in their individual Florida cases. The orders of the district court in this case do not preclude them from taking action in their own cases, the forum in which they chose to litigate. Nor does any order or judgment in this case prevent them from seeking appellate review in those cases.

return critical documents already in their possession that were not obtainable elsewhere . . . ." (Petition at 15.) They are wrong in every respect. First, it is not true that "Petitioners were forced by the *Wilburn* court" to do anything at all. No order or judgment of that court mentioned them, and they never submited to that court's jurisdiction.[5]

Second, the court did not address any "documents already in their possession . . . ." The only documents in issue were documents in *Mr. Nelson's* possession. The record shows that it is to Mr. Nelson that the documents were provided, Mr. Nelson who signed the protective order, and Mr. Nelson who returned the documents. Nothing in the record suggests that any of the Nonparty Appellants ever even saw the documents, much less possessed them.

Third, if, as Nonparty Appellants assert, the documents "were not obtainable elsewhere"—namely, through proper application of the laws governing discovery, motions to compel, and appeals in Nonparty Appellants' own cases against Honda in Florida—then Nonparty Appellants cannot have been "aggrieved" by the *Wilburn* court's proper application of the same rules of law to deny the documents to Nonparty Appellants.

Finally, Nonparty Appellants are wrong in claiming "*de facto* party status" under the various lower court decisions on which they rely. As Nonparty Appellants themselves concede in their case descriptions, that doc-

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[5] Similarly, Nonparty Appellants' contention that they have standing because their appeal is "of an adverse ruling involving the enforcement of a protective order against them" (Petition at 17) is erroneous. No order was enforced against them. For the same reason, Nonparty Appellants cannot show the "injury in fact" that they concede is required for jurisdictional standing. *See Duke Power Co. v. Carolina Envtl. Study Group Inc.*, 438 U.S. 59 (1978); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976). And they plainly are not asserting their own legal rights and interests. *See Valley Forge*, 454 U.S. at 474.

trine arose out of cases in which the nonparty seeking to appeal (1) was a person against whom an injunction had been entered, *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186 (3d Cir. 1990); *Commercial Sec. Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352 (10th Cir. 1972); (2) was a person against whom judgment had been entered, *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542 (9th Cir. 1989); (3) was a person whose assertion of privilege had been denied, *Overby v. United States Fidelity & Guar. Co.*, 224 F.2d 158 (5th Cir. 1955); or (4) was a person who in some other way was the subject of a court order or judgment or had served or been served with process of some sort, *see, e.g., Johnson v. Trueblood*, 629 F.2d 302 (3d Cir. 1980) (appeal by nonparty attorney from order revoking his *pro hac vice* status). Nonparty Appellants were not addressed by or bound by any order or judgment of the district court. They were not forced to respond to any nonparty discovery. They have no ownership interest, legal or equitable, in the documents in issue. They neither served nor were served with any subpoena or writ in this case. And, unlike the appellant in another case on which they rely, *Securities and Exch. Comm'n v. Wencke*, 783 F.2d 829 (9th Cir.), *cert. denied*, 479 U.S. 818 (1986), they were not "haled into the district court . . . ." (Petition at 18.)

In sum, Nonparty Appellants satisfy none of the requirements for jurisdictional standing or for standing under prudential considerations. The court of appeals therefore properly dismissed their appeal.

III. THE COURT OF APPEALS CORRECTLY APPLIED ITS OWN LOCAL RULE IN DISMISSING NONPARTY APPELLANTS' APPEAL.

Nonparty Appellants contend that the court of appeals improperly applied Rule 47A of that court because Honda's motion to dismiss the appeal was not filed within 15 days from the docketing of the appeal and Honda

did not show good cause to exceed the 15-day period specified in Rule 47A for moving to dismiss an appeal for lack of jurisdiction. That contention is specious.

First, Rule 47A does not apply to dismissals based on the standing doctrine that applies prudential considerations. Second, Honda's motion to dismiss stated that if the court of appeals were to determine that it lacked jurisdiction, it should dismiss this matter *sua sponte*, and the court undeniably had authority to do so. If the record shows that there is no jurisdiction, and if the court of appeals recognizes that fact, no rule of law requires that the appeal must go through the entire appellate process of briefing and argument simply because a motion to dismiss was not filed within 15 days of docketing of the appeal. Principles of judicial economy and fairness to the parties provide good cause to dismiss under those circumstances, and Rule 47A provides an exception for good cause.

Third, the court of appeals is in the best position to interpret the meaning and scope of its own local rule. It would make no sense for this Court to grant review to reinterpret that local rule.

The argument that the court of appeals' dismissal is in error because it was untimely is, therefore, without merit. The court of appeals was within its sound discretion in applying its own Rule 47A in its dismissal of this appeal.

CONCLUSION

The petition does not present any issue that warrants this Court's attention. Rather than being in conflict with any decision of any other circuit or of this Court, the decision of the court of appeals correctly applies the guidelines regarding standing as established by this Court's prior decisions. Further, Nonparty Appellants are not aggrieved by the rulings of the district court or by the judgment of the court of appeals, because they are free to pursue in their own litigation the discovery they seek. Having not intervened in this case below, they have no standing to appeal the district court's orders and judgment not addressed to them.

For the foregoing reasons, review by this Court is neither necessary nor appropriate. Respondents respectfully request that Nonparty Appellants' petition be denied.

Respectfully submitted,

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* Counsel of Record

June 21, 1993

APPENDIX A

RULE 29.1 LIST OF SUBSIDIARY COMPANIES

HONDA MOTOR CO., LTD. SUBSIDIARIES

Japan

Honda R&D Co., Ltd.
Honda Engineering Co., Ltd.
Yutaka Giken Co., Ltd.
Zaotec, Inc.
Seikigiken Kogyo Co., Ltd.
Asama Giken Co., Ltd.
Honda Buhin Service Co., Ltd.
Denshi Giken Co., Ltd.
Honda Foundry Co., Ltd.
Honda Lock Mfg., Co. Ltd.
Honda Finance Co., Ltd.
Honda Motor Parts Service Co., Ltd.
Honda International Sales Corporation
Honda Access Corp.
Honda Parts Sales Co., Ltd.
Suzuka Circuitland Co., Ltd.
Honda Trading Corporation
Honda Leasing Corporation
Honda Sogo Tatemono Co., Ltd.
Honda Clio Shin Tokyo Co., Ltd.
Honda Racing Corp.
Honda Sun Mfg., Co., Ltd.
Honda Parking Co., Ltd.
Kibounosato Honda Co., Ltd.

North America

American Honda Motor Co., Inc.
Honda North America, Inc.
Honda of America Mfg., Inc.
Indiana Precision Technology, Inc.
American Honda Finance Corporation

Honda International Trading Corp.
Honda R&D North America, Inc.
Honda Engineering North America, Inc.
Honda Canada, Inc.
Honda de Mexico, S.A. de C.V.

Europe

Honda Austria G.m.b.H.
Honda Europe, N.V.
Honda Belgium N.V.
Honda Motor Europe Limited
Honda of the U.K. Manufacturing Limited
Honda France S.A.
Honda Deutschland G.m.b.H.
Honda R&D Europe G.m.b.H.
Honda Netherlands B.V.
Honda International Finance B.V.
Honda Italia Industrieale S.p.A.
Honda Automobile Italia, S.p.A.
Montesa Honda S.A.
Honda (Suisse) S.A.

Brazil

Honda Motor do Brasil Ltda.

Australia

Honda Australia Pty. Ltd.

New Zealand

Honda New Zealand Limited

Asia

Prospect Engine Manufacturing
Asian Honda Motor Co., Ltd.
Thai Honda Manufacturing Co., Ltd.
Honda Engine Mfg. Philippines, Inc.

Venezuela

Honda Venezuela C.A.

HONDA NORTH AMERICA, INC. SUBSIDIARIES

United States of America

Honda North America, Inc.
American Honda Motor Co., Inc.
American Honda Finance Corp.
Honda Trading of America Corp.
Honda of America Mfg., Inc.
Honda R&D North America, Inc.
Honda Engineering North America, Inc.
Honda Power Equipment Mfg., Inc.
Honda Performance Development, Inc.
American Honda Education Corp.
Calhac
Benton Water Supply, Inc.
American Honda Foundation
KTH Parts Industries, Inc.
Bellemar Parts Industries
Findlex Corporation
New Sabina Industries
Greenville Technology Incorporated
Tomasco Mulciber
Sunbury Components Industries, Inc.
T.S. Trim
Jefferson Industries Corporation
Indiana Precision Technology, Inc.
Blanchester FCM, Inc.
Yotec
Technical Auto Parts
Jay Tech
Honda All Lock
Midwest Express
Honda Accessory
VSK

Canada

Honda Canada, Inc.
Honda of Canada Mfg., Inc. (Div. of CH)

Honda Canada Finance
F&P Mfg., Inc.
BPI Canada
Yachiyo of Ontario

Mexico

Honda de Mexico, S.A. de C.V.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. 91-2175

BONITA L. (ANDERSON) WILBURN AND
LEO WILBURN, Husband and Wife,
Plaintiffs

v.

HONDA MOTOR CO., LTD.,
AMERICAN HONDA MOTOR CO., INC.
AND HONDA R&D CO., LTD.,
Defendants

PROTECTIVE ORDER

The Court, having considered the Stipulation for Entry of Protective Order which has been filed herein, it is hereby Ordered that:

1. Certain materials received by plaintiffs through discovery in this matter which are of confidential and proprietary nature shall be protected and shall only be disseminated by plaintiffs, their counsel, agents, servants, employees, consultants, experts or expert consultants, other Plaintiffs' counsel who are counsel of record in a Honda case, with a signed certification as received from those persons receiving said information certifying they will not release such information to competitors of Honda or others who might exploit it for economic gain. It is further Ordered that reviewing attorneys and experts must certify that they will not release the information to anyone

without first notifying Honda's defense counsel in this case and giving said counsel *thirty (30) days written notice.*

2. Upon receipt of written notifications described above, if Honda's defense counsel files a motion for Protective Order, this material may not be disseminated until a hearing is conducted.

3. Defendants Honda must mark any documents claimed to be proprietary or confidential which they contend are to be governed by this order as "protected by Court Order". If counsel for plaintiffs contests the confidential designation attached to a document by defendants, such counsel and counsel for defendants are required to consult in an attempt to come to an agreement as to which documents are proprietary or competitively sensitive. If counsel cannot agree and a hearing is necessary, the defendants Honda will have the burden of establishing the proprietary or confidential nature by motion, giving the underlying reasons for supporting its contentions with regard to the confidentiality and competitively sensitive nature of the contested documents.

4. Any of plaintiffs' experts and/or consultants in this action who are given access to competitively sensitive data or otherwise proprietary information shall be presented with a copy of the Stipulation and Protective Order by plaintiffs' attorneys.

5. Upon completion of the trial and any appeal in this action and the satisfaction of any judgment, or upon conclusion of any settlement, plaintiffs' attorneys shall provide to counsel for defendants Honda an affidavit stating that they have complied with the provisions of the Stipulation and Protective Order, and have received affidavits from their experts and consultants that they have also complied with the provisions of the Stipulation and Protective Order.

6. "Competitively sensitive data" shall be defined as information about defendants' business, products, practices or procedures which, in the ordinary course of busi-

ness, is not voluntarily disclosed by the defendants to the public or to third persons or entities who do not have a need to know.

7. "Competitively sensitive data" includes confidential and proprietary information. Documents or things which concern, reflect, embody, or constitute the foregoing include, but shall not be limited to, correspondence, memoranda, notes, deposition transcripts and exhibits thereto, plans, specifications, blueprints, drawings, test reports, test procedures, test manuals, market surveys, market analyses, photographs, motion pictures, accident reports, claims, videotapes, graphs, charts, and financial data, including but no limited to, budget information. Data which defendants regard as competitively sensitive shall be so designated as set forth in Paragraph 3 above prior to production to plaintiff.

8. At such time that Plaintiffs' counsel herein shall have neither a pending Honda case on file or a pending claim of which Honda has received notice, Plaintiffs' counsel will return all documents and other information designated as confidential to counsel for Defendants.

9. No party hereto shall be bound by this Order as to any information which it possessed prior to this action, unless that information was obtained from the other party under circumstances requiring the first party to treat it as confidential.

10. Any party claiming that information designated by the other party as confidential has been in the possession of such first party or has been in the possession of the public prior to disclosure of such information in discovery herein shall have the burden of proving such earlier possession or such public knowledge of such information.

11. This Order shall be without prejudice to the rights of the parties in any other action and applies solely to the above captioned action.

12. By this Order the parties do not waive any rights they may possess to compel further discovery responses, or to object to any further discovery requests made by the other party.

13. The terms of this Order shall remain fully active until released by order of this Court or the written consent of defendants and this Court shall retain jurisdiction over this Order and the foregoing Stipulation for the purposes of enforcing same and adjudicating claims or breaches thereof and administering damages and other remedies related thereto.

ENTERED this 20 day of March 1992.

/s/ Morris Arnold
U. S. District Judge

[Filed Mar. 20, 1992]

I agree to be bound by the terms of the foregoing Protective Order and to be subject to the jurisdiction of the United States District Court for the Western District of Arkansas, Fort Smith Division, for purposes of enforcement of said Protective Order. I am a licensed attorney representing the Plaintiffs in a case involving all terrain vehicles. The style and cause number of said case is as follows:

Style: Carter v. Honda et al

Cause Number/Court: Middle District of Fla.
91574-CIV-T-23A

/s/ Paul A. Nelson
PAUL A. NELSON

9/25/92
Date Signed